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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5946

ROBERT and LINDA PARKINS, Appellants,

v.

PEOPLE OF THE STATE OF ILLINOIS, Appellee.

ON APPEAL FROM THE ILLINOIS SUPREME COURT

MOTION TO DISMISS OR AFFIRM

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INDEX

	Page
Introduction	1
The Statute Involved	1
The Nature of the Case	2
Question Presented	3
IS THE SUBSECTION OF THE ILLINOIS STATUTE DEFINING AND PROHIBITING TELEPHONE HARASSMENT OVERBROAD IN PROSCRIBING TELEPHONE CALLS MADE WITH THE INTENT TO ABUSE, THREATEN OR HARASS?	
The Question is not Substantial.	3
Conclusion	10

CITATIONS

CASES

People v. Smith, 89 Misc.2d 789, 392 N.Y.S.2d 869 (1977), cert. den. 434 U.S. 920 (1977)

Collection Consultants, Inc. v. State, 556 SW.2d 787 (Tex.Ct.Crim.App. 1977), appeal dismissed 436 U.S. 901 (1978)

Walker v. Dillard, 363 F.Supp. 921 (W.D.Va. 1973), 523 F.2d 3 (4th Cir. 1975), cert. den. 423 U.S. 906 (1975)

Constantino v. State, 243 Fa. 595, 255 SE.2d 710 (1979), cert. den. __ U.S. __, 100 S.Ct. 293 (1979)

Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)

People v. Parkins, 77 Ill.2d 253, 396 N.E.2d 22, 32 Ill.Dec. 909 (1979)

People v. Klick, 66 Ill.2d 269, 362 N.E.2d 329, 5 Ill.Dec. 329 (1977)

Walker v. Dillard, 523 F.2d 3 (4th Cir. 1975), cert. den. 423 U.S. 906 (1975)

Radford v. Webb, 446 F.Supp. 608 (W.D.N.C. 1978)

State v. Anonymous, 34 Conn.Sup. 689, 389 A.2d 1270 (Sup.Ct. of Conn., App. Sess. 1978)

von Lusch v. State, 39 Md.App. 517, 387 A.2d 306 (Ct. of Sp.App. of Md. 1978)

STATUTES

Ill.Rev.Stat.1977, Ch. 134, Sec. 16.4-1(2)

La.Rev.Stat.Ann. (1974) Sec. 14:285

Ill.Rev.Stat.1977, Ch. 38, Sec. 15-1

Ill.Rev.Stat.1973, Ch. 38, Sec. 26-1(a)(2)

Va. Code, (1950) Sec. 18.1-238

N.C. Gen. Stat., (1969) Sec. 14-196

Conn.Gen.Stat.Ann., (1972) Sec. 53a-183

Md.Crim.Law Code Ann., (1957) Art. 27, Sec. 555A

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MOTION TO DISMISS OR AFFIRM

INTRODUCTION

The People of the State of Illinois, Appellee, move this Honorable Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Illinois, on the ground that it is manifest that the question presented by this appeal is so unsubstantial as not to require further argument.

THE STATUTE INVOLVED

This appeal raises the question of the constitutionality of a subsection of the Illinois Statute prohibiting telephone harassment (Ill.Rev.Stat.1977, Ch. 134, Sec. 16.4-1(2)). That statute is as follows:

> Harassment by telephone is use of telephone communication for any of the following purposes:
>
> (1) Making any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent with an intent to offend; or
>
> (2) Making a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number; or

> (3) Making or causing the telephone of another repeatedly to ring, with intent to harass any person at the called number; or
>
> (4) Making repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or
>
> (5) Knowingly permitting any telephone under one's control to be used for any of the purposes mentioned herein.
>
> Every telephone directory published for distribution to members of the general public shall contain a notice setting forth a summary of the provisions of this Section. Such notice shall be printed in type which is no smaller than any other type on the same page and shall be preceded by the word "WARNING". All telephone companies in this State shall cooperate with law enforcement agencies in using their facilities and personnel to detect and prevent violations of this Act.

THE NATURE OF THE CASE

The Appellants, Robert and Linda Parkins were charged in a criminal complaint filed on August 21, 1978, with the offense of harassment by telephone in that they made a telephone call " . . . with the intent to abuse, threaten or harass Richard E. Bonavia and members of his family at the called number." (Robert Parkins, C* 2, Linda Parkins, C 3). The Appellants filed a motion to dismiss the complaint charging that the statute under which the charge was brought was facially overbroad and vague, and therefore unconstitutional (Robert Parkins C 7, Linda Parkins, C 8).

The Appellant's motion to dismiss was granted by the Honorable Bradner C. Riggs, an associate judge of the Seventeenth Judicial Circuit, Winnebago County, in an opinion filed October 4, 1978.** Judge Riggs found the subsection of the statute under which the Appellants had been charged to be overbroad.

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*"C" refers to the common law record on appeal

**This opinion is attached to the Jurisdictional Statement as Appendix B

The State took a direct appeal from this finding to the Illinois Supreme Court. In an opinion issued October 19, 1979, the Illinois Supreme Court found the statute constitutional.* That Court found that the statute was not overbroad because the words "abuse" and "harass" acquire a more restricted meaning because they were used in conjunction with the word "threaten".

The Appellants appeal directly to this Honorable Court under 28 U.S.C. 1257(2), as a case in which the highest court of the state has upheld the constitutionality of a state statute in the face of a challenge to the statute's constitutionality.

QUESTION PRESENTED

Is the subsection of the Illinois Statute defining and prohibiting telephone harassment overbroad in proscribing telephone calls made with the intent to abuse, threaten and harass?

THE QUESTION IS NOT SUBSTANTIAL

The Appellants argue that the wide spread practice of penalizing persons who make harassing telephone calls infringes upon the First Amendment, and presents a substantial question for review. The Appellants note that this question has not been addressed by this Honorable Court.

This Court has had the opportunity to address the issue of the constitutionality of telephone harassment statutes and has in the past declined to do so.[1] The People maintain that the instant case does not present a substantial federal question for this Court's

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*This opinion is attached to the Jurisdictional Statement as Appendix A

[1] People v. Smith, 89 Misc.2d 789, 392 N.Y.S.2d 968 (1977), cert. den. 434 U.S. 920 (1977)
Collection Consultants, Inc. v. State, 556 SW.2d 787 (Tex.Ct.Crim.App. 1977), appeal dismissed, 436 U.S. 901 (1978)
Walker v. Dillard, 363 F.Supp. 921 (W.D.Va. 1973), 523 F.2d 3 (4th Cir. 1975), cert. den. 423 U.S. 906 (1975)
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consideration, and urge this Honorable Court to dismiss this appeal. Alternatively, the People submit that the decision of the Illinois Supreme Court was manifestly correct, and urge this Court to affirm that decision.

It is the Appellants' contention that the Illinois telephone harassment statute (Ill.Rev.Stat.1977, Ch. 134, Sec. 16.4-1(2)) is overbroad. The Appellants urge that the language of this subsection which prohibits telephone calls made with the intent to abuse, threaten, and harass lacks objective standards with which to evaluate conduct, and thus includes within its sweep speech related conduct which is protected by the First Amendment. The Appellants acknowledge that the State does have the authority to prohibit certain types of speech related conduct, but contend that the legislative goal of proscribing the illegitimate use of the telephone could be and should be "more narrowly achieved," Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960).

The People maintain that the Illinois Supreme Court was correct in finding that the words abuse, threaten and harass were not overbroad.[2] While the Appellant's contend that the statute is so broad as to encompass protected communication, the People assert that that is clearly not the case.

First, it is clear that it is the intent of the caller which must be to abuse, threaten, or harass, and not the perception of the person receiving the call which is the determining factor in deciding whether a telephone call falls within the prohibition of the statute. The People submit that a telephone call made for the legitimate purpose of communicating with a person at the called number would of necessity be lacking the specified intent to abuse, threaten or harass.

Secondly, the Illinois Supreme Court has clearly demonstrated its willingness to impose a limiting construction upon the terms of

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[2] See People v. Parkins, 77 Ill.2d 253, 396 N.E.2d 22, 24, 32 Ill.Dec. 909 (1979), attached to the Jurisdictional Statement as Appendix A.

the statute.[3] As the court noted, the application of the principle of noscitur a sociis allows the words "abuse" and "harass" to take on a more restricted meaning due to their association with the word "threaten." The Supreme Court of Louisiana, applied the same principle in upholding the constitutionality of that state's telephone harassment statute.[4] It found that the words "annoy", "harass" and "embarass" were subject to more restricted meanings by virtue of their association with the words "abuse", "torment" and "offend," State v. Meunier, __ La. __, 354 So.2d 535, 537-538 (S.Ct. La. 1978). As that court also observed, "It would be impractical to set forth in detail the numerous forms harassment could take." State v. Meunier, supra, 354 So.2d at 538.

The People also submit that not only would the words "abuse" and "harass" take on a more restricted meaning from their association with the word "threaten", but also the word "threaten" must itself take on a restricted meaning from its use in a statute which involves the imposition of criminal penalties. The Illinois Criminal Code provides a very specific definition of the word "threat"[5] and the

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[3]See People v. Parkins, supra, 396 N.E.2d at 23-24, attached to the Jurisdictional Statement as Appendix A.

[4]La.Rev.Stat.Ann. (1974) Sec. 14:285

[5]Ill.Rev.Stat.1977, Ch. 38, Sec. 15-5

> Threat. As used in this Part C "threat" means a menace, however communicated, to:
> (a) Inflict physical harm on the person threatened or any other person or on property; or
> (b) Subject any person to physical confinement or restraint; or
> (c) Commit any criminal offense; or
> (d) Accuse any person of a criminal offense; or
> (e) Expose any person to hatred, contempt or ridicule; or
> (f) Harm the credit or business repute of any person; or
> (g) Reveal any information sought to be concealed by the person threatened; or
> (h) Take action as an official against anyone or anything, or withhold official action, or cause such action or withholding; or
> (i) Bring about or continue a strike, boycott or other similar collection action if the property is not demanded or received for the benefit of the group which he purports to represent; or
> (j) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
> (k) Inflict any other harm which would not benefit the offender.

People submit that this definition although presented in a different context, would be instructive to the Illinois courts in determining the scope of the word "threaten" in the telephone harassment statute.

Thus, the People conclude that it is not true, as the Appellants contend that the statute in question would encompass within its prohibitions the telephone call "made with the intent to 'threaten' to cancel a subscription for service."[6] Such a "threat" is clearly not one contemplated by a statute which imposes criminal penalties.

The willingness of the Illinois Supreme Court to impose a limiting construction upon the Illinois telephone harassment statute would save that statute from any problem of unconstitutional overbreadth. The court in Walker v. Dillard, 523 F.2d 3 (4th Cir. 1975), cert. den. 423 U.S. 906 (1975) struck down a section of the Virginia telephone harassment statute[7] as overbroad, finding that the state courts had not placed a limiting construction upon the statute, and noting that the federal court was without power to do so. Similarly, in Radford v. Webb, 446 F.Supp. 608 (W.D.N.C., 1978), the court invalidated a section of the North Carolina telephone harassment statute[8] stating, "A statute whose terms are thus susceptible of constitutional as well as unconstitutional application can only survive if it has been authoritatively construed to exclude speech which, though vulgar or offensive, is protected by the First and Fourteenth Amendments." (446 F.Supp. at 611).

Prior to the instant statute, Illinois proscribed the making of telephone calls made with the intent to annoy through a subsection of the Criminal Code dealing with disorderly conduct.[9] The Illinois Supreme Court in People v. Klick, 66 Ill.2d 269, 362 N.E.2d 329, 5 Ill.Dec. 329 (1977) found that subsection of the statute to be uncon-

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[6]Jurisdictional Statement at page 8

[7]Va. Code, (1950) Sec. 18.1-239

[8]N.C. Gen. Stat. (1969) Sec. 14-196

[9]The pertinent part of that statute (Ill.Rev.Stat.1973, Ch. 38, Sec. 26-1(a)(2)) stated: "A person commits disorderly conduct when he knowingly: (2) With intent to annoy another, makes a telephone call, whether or not conversation thereby ensues . . . ."

stitutionally overbroad. The current statute demonstrates a diligent attempt by the legislature of the State of Illinois properly to limit the application of the criminal penalties for telephone harassment.

It is clear that both the legislature and the Supreme Court of the State of Illinois are aware of their responsibility to narrow the application of the telephone harassment statute so as not to interfere with the First Amendment. Their respective efforts to make the language of the statute and its application as narrow as is reasonable under the circumstances are factors to be considered in arriving at the conclusion that the present telephone harassment statute is not overbroad.

The People submit that the Illinois Supreme Court's opinion in the instant case has demonstrated the court's recognition of its duty to place a limiting construction on the Illinois telephone harassment statute. The People maintain that the limiting construction placed on the terms of the statute by the court removes any potential problem of overbreadth.

The Appellants also assert that the Illinois Supreme Court struck an improper balance of interests in finding that the right or privacy of the recipient of an intentionally abusive threatening or harassing telephone call outweighs the caller's freedom of speech. It is the People's position that the recipient's right to privacy must outweigh the caller's right to intrude upon that privacy with an intentionally abusive telephone call.

Communication by telephone is fundamentally different from other forms of communication. It cannot be compared to the person speaking on a street corner whose voice reaches all passers-by, whether they be willing or unwilling listeners. In that situation, the unwilling listener is free to pass the speaker by, incurring no imposition. It cannot be compared to communication by mail, for in that situation the unwilling recipient of the piece of mail may summarily discard it with minimal imposition. It cannot be compared to communication by means of the public media, for an unwilling

listener is always free to turn off his radio or television or refrain from buying and/or reading any material he finds unacceptable. The recipient of a telephone call, however, is not able to avoid the inevitable imposition upon his privacy which results from an unwanted telephone call. To be sure the telephone provides a valuable tool for legitimate communication, but when it is used for an illegitimate purpose, its intrusion on the recipient's privacy becomes intolerable.

The fact that each consumer of telephone service has an identifying number which is readily accessible allows him to be singled out for harassment in a manner that is not similar to any other form of communication. Even if the recipient of a telephone call chooses not to answer, the incessant ringing of the telephone (which is often itself the means of harassment) becomes unbearable. Thus, the People contend that it is clear that the State has a legitimate interest in guarding the privacy of its citizens from calls made with the intent to abuse, threaten and harass.

The People maintain that the State has a legitimate and justifable interest in regulating and proscribing the instrusion into a person's privacy which the abusive, threatening and harassing telephone call presents. As the Appellants note, virtually every state in the union, with few exceptions, has as part of its law a statute regulating the abusive and harassing use of the telephone.[10] This would indicate that it has been uniformly recognized that use of the telephone for purposes of abusing a person at the called number is not a legitimate and protected form of communication.

The Superior Court of the State of Connecticut stated in upholding the constitutionality of its telephone harassment statute:[11]

> As venerated a place as freedom of speech may hold in the constitutional scheme, reasonable regulation of the place and manner of its exercise has been upheld consistently. Breard v. Alexandria, 341 U.S. 622, 642, 71 S.Ct. 920, 95 L.Ed. 1233; Cox v. New Hampshire, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049. Where the means of communication involves an intrusion upon privacy, the right of free expression must be balanced against the right to be

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[10] See Jurisdictional Statement, Appendix D

[11] Conn.Gen.Stat.Ann., (1972) Sec. 53a-183

let alone. Rowan v. Post Office Department, 397 U.S. 728, 736, 90 S.Ct. 1484, 25 L.Ed.2d 736. A telephone is not a public forum where, in vindication of our liberties, unreceptive listeners need be exposed to the onslaught of repugnant ideas. See Lehman v. Shaker Heights, 418 U.S. 298, 302-303, 94 S.Ct. 2714, 41 L.Ed.2d 770. The overbreadth principle is not violated by the unrestricted scope of the messages which the statute may ban because it is the manner and means employed to communicate them which is the subject of the prohibition rather their content. The statute is not flawed because a recital on the telephone of the most sublime prayer with the intention and effect of harassing the listener would fall within its ban as readily as the most scurrilous epithet. The prohibition is against purposeful harassment by means of a device readily susceptible to abuse as a constant trespasser upon our privacy. That words may be the instrument of annoyance does not insulate such wrongful conduct from criminal liability.

State v. Anonymous, 34 Conn.Sup. 689, 389 A.2d 1270, 1273-1274 (Sup.Ct. of Conn., App. Sess., 1978)

The same analysis was employed by the Court of Special Appeals of Maryland in upholding the constitutionality of its telephone harassment statute.[12] The court stated:

> The appellant makes the additional argument that Caldwell v. State [26 Md.App. 94, 337 A.2d 476 (1975)] to the contrary notwithstanding, Section 555A is unconstitutional because of the chilling effect it may have upon the First Amendment. The argument misperceives the values protected by that amendment. The right to express ideas does not include the right to impose the communication of those ideas upon an unwilling listener. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The Maryland statute does not prohibit speech or communication as such. It simply protects one from the harassment and annoyance from having his own telephone used in an abusive fashion by an unwanted intruder upon his privacy. Citizens have a right to speak. Citizens also have a right not to be forced to listen. Freedom of speech does not encompass the right to abuse the telephone with the specific intent to annoy and to harass the recipient of the call. Caldwell v. State, supra.
>
> von Lusch v. State, 39 Md.App. 517, 387 A.2d 306, 310 (Ct. of Sp.App. of Md. 1978)

Thus the People conclude that in the context of harassing telephone communication, the recipient's right to privacy outweighs the caller's right to harass. Therefore, the Illinois Supreme Court in

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[12] Md.Crim.Law Code Ann., (1957) Art. 27, Sec. 555A

finding the Illinois telephone harassment statute constitutional did not improperly balance the relative rights of the caller and the recipient.

In conclusion, as has been noted, statutes proscribing telephone harassment exist in some form in practically every state, making it a minor criminal offense purposefully to abuse another person by means of a telephone. As has been argued, the potential unconstitutional overbreadth of such statutes is removed by a limiting construction placed on the terms of the statute by the State courts. It is the People's position that decision of the Illinois Supreme Court is manifestly correct, and that the court's further restriction of the terms of the statute removes any potentially overbroad interpretation. The resulting balance which may have been struck in favor of the call recipient's right to privacy was a proper one.

CONCLUSION

WHEREFORE, the People respectfully submit that the question presented by the Appellant is so unsubstantial as not to require further argument, and the People respectfully move this Honorable Court to dismiss this appeal, or, in the alternative, affirm the judgment entered in this case by the Supreme Court of the State of Illinois.

Respectfully submitted,

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